(1927) 11 BOM CK 0024

Bombay High Court

Case No: Second Appeal No. 684 of 1924

Mahadu Rowji Kate		APPELLANT
	Vs	
Jijai Laxman Misal		RESPONDENT

Date of Decision: Nov. 29, 1927

Acts Referred:

- Easements Act, 1882 - Section 7 ill(j)

Citation: (1928) 30 BOMLR 443 : 110 Ind. Cas. 120

Hon'ble Judges: Patkar, J; Madgavkar, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Madgavkah, J.
The question in this appeal is whether the plaintiffs-respondents are entitled to the removal of the dam A in the plan Exh. 106 made by the defendants-appellants so as to allow the plaintiffs-respondents the amount and flow of water which they enjoyed previously before the erection by the appellants of the dam A at their dam B lower down.

2. The question has been complicated by an element which has no bearing on the legal rights of the parties. The stream has its origin in hills in the boundary of Bhambe, then divides or almost divides it from the boundary of Kushi and finally flows south-east through Kushi. The lands to the north of the stream in question are up to a certain point in the possession of the villagers from Bhambe to the north while those to the south are enjoyed by the villagers of Kushi. The struggle for water in the arid Deccan is, therefore, intensified by this village rivalry. But the question as to the exact boundary between the two villages and how far this stream falls within the limits of one boundary or the other at the debatable points is irrelevant to this suit.

3. The necessary facts as found by the lower Courts are short. In the year 1911 the present appellants from Bhambe to the north of the stream filed a suit against the present plaintiffs-respondents from Kushi to its south for a declaration that they were entitled to a half share in the water of the present dam B by enjoyment for fifteen days every month. That claim was resisted by the present plaintiffs-respondents who succeeded in establishing their sole right to the water of the dam B including the cistern they had erected to the south within Kushi limits. Both the lower Courts have found that the dam A is not ancient as the appellants contended but was erected by them during the pendency of that litigation in the year 1913, within twelve years of the present suit by the respondents, and next that the dam A caused a material obstruction and reduction in the water at the dam B.

4. On these findings the lower Courts have ordered the appellants to remove the dam A and have added a decree in favour of the respondents for possession of the water of the stream above B.

5. It is argued for the appellants that even on these facts, the remarks of the trial Court towards the close of its judgment that "the plaintiffs and other Kushikara and Jimanwadikars have the exclusive right to all the water of Pabalodha in suit above and to the west of the B dam including that of the main big living spring without any obstruction" are not justified and are opposed to the ordinary rights of the riparian owners from Bhambe from the points A to B inasmuch as mere long user cannot cause the ordinary rights of these riparian owners to lapse. Reliance is placed on the principle of decisions such as Roberts v. Richards (1881) 50 L.J. Ch. 297.

6. For the respondents it is argued that on the findings of fact of the two Courts below, the respondents are entitled to the relief they have obtained, and that the point now taken as to the rights of riparian owners between A and B wag not included in the pleadings or issues and was not taken in the lower Courts. The appellants cannot be allowed to take it for the first time in second appeal.

7. The contention for the respondents is, in our opinion, correct. There is nothing to show that the appellants are or represent the owners of the lands of Bhamba between the dams A and B. And these rights having never been set up cannot be prejudiced by the present decision. In so far as they have any bearing on the present question, the law is clear. As stated by Lord Kings-down in Miner v. Gilmour (1858) 12 M.P.C.156 :&#65533;

By the general law applicable to running streams, every riparian proprietor has a right to what may b,9 called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what maybe deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors,

either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But, he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury.

8. This is in effect the law as it is codified in Section 7, ill, (j), of the Indian Easements Act, and it has been applied in a series of decisions. It suffices to refer to decisions such as The First Assistant Collector of Nasik v. Shamji Dasrath Patil I.L.R (1878) Bom. 209, Dinkar v. Narayan I.L.R (1905) Bom. 357, s.c. 7 Bom. L.R. 265, and Yesu Sakharam v. Ladu (1926) 29 Bom. L.R. 291. The facts of the last case closely resemble the facts in the present case. Their Lordships of the Privy Council have laid down the same principle in cases such as (1897) L.R. 24 I.A. 60 (Privy Council) ; and the recent Privy Council case of Mavnga Bya v. Maung Kyi Nyo (1925) L.R. 52 IndAp 385, s.c. 27 Bom. L.R. 1427. We are of opinion that the respondents have established their rights from 1911 to the use for irrigation purposes of the water at the point B as it then existed. The appellants have in 1913, that is to say, subsequent to the recognition of the appellants'' rights, erected a dam higher up at A. That dam, as appears from the evidence and as is obvious even from the map, to effect diverts a large quantity of water from B and takes it along north to the appellants lands to join the appellants own dam C further down for irrigating the appellants'' and other lands to the north of the stream lower down. Such extraordinary user of the water above B by the appellants to the prejudice of the respondents'' rights as established by Jaw cannot be allowed. The respondents are entitled to have the dam at A removed so as to enjoy the quantity and flow of water they have been enjoying at B since 1911. At the same time the observations to which the appellants'' learned pleader demurs as to the explicit right to all the water cannot be understood as going further in favour of the respondents. And in any ease, it is not, in our opinion, a proper decree to order the respondents to recover possession of the water of the stream above B as the trial Court has done.

9. We, therefore, substitute what is, in our opinion, a better form of the decree by declaring that the plaintiffs-respondents are entitled to the amount and flow of all the water at dam B which they have established in the suit of 1911 and that the appellants be ordered not to interfere with this enjoyment and to remove the dam A for this purpose. Apart from this the appeal is dismissed with costs.